Impeachment Grounds: Part 6: Quotes from Sundry Commentators

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Summary

This is a collection of selected background materials pertinent to the issue of what constitutes impeachable misconduct for purposes of Article II, section 4 of the United States Constitution quoted below. It includes quotations from treatises and law reviews on the question. Unfortunately, the constraints of time and space, among others, preclude presentation of little more than a hint of the views of the cited works. It is the last of six segments that together with footnotes comprise, *Impeachment Grounds: A Collection of Selected Materials,* CRS Report 98-882.

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. U.S.Const. Art. II, §4

Charles Black

Impeachment: A Handbook
39-40 (1974)

"Omitting qualifications, and recognizing that the definition is only an approximation, I think we can say that `high Crimes and Misdemeanors,' in the constitutional sense, ought to be held to be those offenses which are rather obviously wrong, whether or not `criminal,' and which so seriously threaten the order of political society as to make petulant and dangerous the continuance in power of their perpetrator. The fact that such an act is also criminal helps, even if it is not essential, because a general societal view of wrongness, and sometimes of seriousness, is, in such a case, publicly and authoritatively recorded.

"The phrase `high Crimes and Misdemeanors' carries another connotation—that of *distinctness of offense*. It seems that a charge of high crime or high misdemeanor ought to be a charge of a definite act or acts, each of which in itself satisfies the above requirements. General lowness and shabbiness ought not to be enough. The people take some chances when they elect a man to the presidency, and I think this is one of them," BLACK, IMPEACHMENT: A HANDBOOK, 39-40 (1974).

Bob Barr

"The `President and all civil Officers of the United States shall be removed from Office on Impeachment for and Convictions of, Treason, Bribery, or other high Crimes and Misdemeanors.' The phrase `high crimes and misdemeanors' was an English term of art that denoted political crimes against the state, and the choice of this phrase was a deliberate and considered action. By including that English phrase, our Founding Fathers intended to expand the scope of impeachable offenses beyond the scope of criminally indictable offenses. This language incorporates political offenses against the state that injure the structure of government and tarnish the integrity of the political office. As Alexander Hamilton observed, these political offenses include breaches of the public trust that a president assumes once he has taken office. Hamilton made this point in the Federalist, describing impeachable crimes as `those offences which proceed from the misconduct of public men, or, in other words, from the abuses or violations of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself", BARR, *High Crimes and Misdemeanors*, 2 TEXAS REVIEW OF LAW AND POLICY 1, 9-10 (1997).

John Labovitz

"The concept of an impeachable offense guts an impeachment case of the very factors—repetition, pattern, coherence—that tend to establish the requisite degree of seriousness warranting the removal of a president from office. . . .

"The most pertinent precedent in this nation's history for framing a case for the removal of a chief executive may well be the earliest—the Declaration of Independence. In expressing reasons for throwing off the government of George III, the Continental Congress did not claim that there had been a single offense justifying revolution. Instead, it pointed to a course of conduct; it 'pursu[ed] invariably the same Object' and evinced a common design; it 'all [had] in direct object the establishment of absolute Tyranny over these States.' It was this pattern of wrongdoing taken together, not each specification considered alone, that showed the unfitness of George III to be

the ruler of the American people. . . . [T]he unfitness of a president to continue in office is to be judged in much the same way: with reference to totality of his conduct and the common patterns that emerge, not in terms of whether this or that act of wrongdoing, viewed in isolation, is an impeachable offense," LABOVITZ, PRESIDENTIAL IMPEACHMENT, 129-31 (1978).

Paul Fenton

"It can therefore be concluded that impeachment is not a political tool for arbitrary removal of officials; that the standard for what constitutes an impeachable offense is not based on an inflexible historical precedent or on the judicial tenure clause; that impeachment is not limited to crimes, whether indictable or otherwise; and that the sanction of impeachment does not extend to noncriminal misconduct unless it involves violation of statutory law, the conduct of the respondent's official duties or an abuse of his official position.

"Within these limitations, it is extremely difficult to define the proper standard for an impeachable offense in affirmative terms. . . .

"The only generalization which can safely be made is that an impeachable offense must be serious in nature. . . .

"While there are no clear rules as to what constitutes a serious offense, there are a number of factors which are relevant. Thus an offense is more serious if it is a criminal violation or if it involves moral turpitude. In the words of one court,

It may be safely asserted that where the act of official delinquency consists in the violation of some provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done, with a corrupt intention, or where the negligence is so gross and disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office. But where it consists of a mere error of judgment or omission of duty without the element of fraud, and where the negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the State," Fenton, *The Scope of the Impeachment Power*, 65 NORTHWESTERN UNIVERSITY LAW REVIEW 719, 745-7 (1970).

Laurence Tribe

"Despite then-Congressman Gerald Ford's well-known assertion that 'an impeachable offence is whatever a majority of the House of Representatives considers [it] to be', there is now wide agreement that the phrase `high Crimes and Misdemeanor' was intended by the Framers to connote a relatively limited category closely analogous to the `great offences' impeachable in common law England. In addition to treason and bribery, the 'great offences' included misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of legislative prerogatives, and corruption.

"There have been only two serious attempts to impeach American Presidents. In both instances, the offenses charged reflected the impact of the common law tradition discussed here: offenses have been regarded as impeachable if and only if they involve serious abuse of official power," TRIBE, AMERICAN CONSTITUTIONAL LAW 217 (1978).

Theodore Dwight

"I have dwelt the longer on this point because many seem to think that a public officer can be impeached for a mere act of indecorum. On the contrary, he must have committed a true crime, not against the law of England but against the law of the United States. As impeachment is nothing but a mode of trial, the Constitution only adopts it as a mode of procedure, leaving the crimes to which it is to be applied to be settled by the general rules of criminal law.

". . . [A]s there are under the laws of the United States no common law crimes, but only those which are contrary to some positive statutory rule, there can be no impeachment except for a violation of a law of Congress or for the commission of a crime named in the constitution. English precedents concerning impeachable crimes are consequently not applicable," Dwight, *Trial by Impeachment*, 15 AMERICAN LAW REGISTER (6 N.S.) 257, 268-69 (1867).

Alexander Simpson

"Many attempts have been made to define this power, quite commonly by those who were trying to make the definition fit the facts to a particular case, rather than to have it accord with the constitutional provisions only. A notable exception to this, however . . . is what was said by Manager (afterwards President) Buchanan in the Peck Impeachment:

'What is misbehavior in office? In answer to this question and without pretending to furnish a definition, I freely admit that we are bound to prove that the respondent has violated the Constitution, or some known law of the land. This, I think, is the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate on the Articles of Impeachment against him, in opposition to the principle for which his counsel in the first instance strenuously contended, that in order to render an offence impeachable it must be indictable. But this violation of law may consist in the abuse, as well as in the usurpation of authority. The abuse of a power which has been given may be criminal as the usurpation of a power that has not been granted.'

"Perhaps that statement should be broadened to include offences of so weighty a character, and so injurious to the office, that every official is bound to know that they are of the same general character as crimes, and might well be made criminal by statute; but the *terra incognita* beyond, no one can properly be asked to explore under the existing constitutional provisions, if for no other reason than because it is a fixed and salutary principle that penal provisions shall be so construed that the persons to be affected by them may certainly know what things they are forbidden to do," Simpson, *Federal Impeachments*, 64 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 651, 881 (1916).

Michael Gerhardt

"[A]ttempts to limit the scope of impeachable offenses have rarely proposed limiting impeachable offenses only to indictable offenses. Rather, the major disagreement among commentators has been over the range of nonindictable offenses for which someone may be impeached.

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"The . . . problem is how to identify those nonindictable offenses for which certain high-level government officials may be impeached. Given that certain federal officials may be impeached and removed for committing serious abuses against the state and that these abuses are not confined to indictable offenses, the challenge is to find contemporary analogues to the abuses

against the state that authorities such as Hamilton and Justices Wilson and Story viewed as suitable grounds for impeachment. On the one hand, these abuses may be reflected in certain statutory crimes. Violations of federal criminal statues, such as the bribery statute, represent abuses against the state sufficient to subject the perpetrator to impeachment and removal, because bribery demonstrates serious lack of judgment and respect for the law and because bribery lowers respect for the office. In other words, there are certain statutory crimes that, if committed by public officials, reflect such lapses of judgment, such disregard for the welfare of the state, and such lack of respect for the law and the office held that the occupant may be impeached and removed for lacking the minimum level of integrity and judgment sufficient to discharge the responsibilities of the office. On the other hand, Congress needs to be prepared, as then-Congressman Ford pointed out, to explain what nonindictable offenses may be impeachable offenses by defining contemporary political crimes. The boundaries of congressional power to define such political crimes defy specification because they rest both on the circumstances underlying a particular offense (including the actor, the forum, and the political crime) and on the collective *political* judgement of Congress," Gerhardt, *The Constitutional Limits of Impeachment*, 68 TEXAS LAW REVIEW 1, 83, (1989).

Ronald Rotunda

"Moreover, leaving aside historical precedent, to limit impeachment to the commission of crimes is bad policy, such a limitation is both too broad and too narrow. It is too broad because some crimes have no functional relation to the problem of malfeasance or abuse of office. For example, if an official in the executive branch, a judge, or a legislator, had been arrested once for driving while intoxicated, that crime should not merit the drastic remedy of removal from office.

"The proposed limitation is also too narrow, for the 'civil Officer' might engage in many activities which amount to abuse of office and yet not commit any crimes. For example, if the President abused his pardon power by unconstitutionally pardoning a judge who had been impeached or summoned the Senators from only a few states to ratify a treaty, the President may have violated no criminal law, but he or she has abused the office. . . ." Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KENTUCKY LAW JOURNAL 707, 725-26 (1988).

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